SECOND DIVISION

G.R. No. 187214 — SANOH FULTON PHILS., INC. and MR. EDDIE JOSE, *Petitioners*, v. EMMANUEL BERNARDO and SAMUEL TAGHOY, *Respondents.*

Promulgated:
AUG 14 2013

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SEPARATE CONCURRING OPINION

CARPIO, *J.*:

I concur with the Court's denial of the petition. Indeed, Sanoh Fulton Phils., Inc. (Sanoh) is liable for illegal dismissal because it failed to prove that the impending losses it expected to incur were imminent and, consequently, that the retrenchment it conducted was necessary to prevent such alleged impending losses. However, I file this separate opinion to differentiate the two kinds of losses which can justify retrenchment and the corresponding proof required for each kind.

Retrenchment to prevent losses is one of the authorized causes for dismissal of employees. Article 283 of the Labor Code states:

> Art. 283. Closure of establishment and reduction of personnel. — **The employer may also terminate the employment of any employee due to** the installation of labor-saving devices, redundancy, **retrenchment to prevent losses** or the closing or cessation of operation of the establishment or undertaking unless the closing is for the purpose of circumventing the provisions of this Title, by serving a written notice on the workers and the Ministry of Labor and Employment at least one (1) month before the intended date thereof. In case of termination due to the installation of labor-saving devices or redundancy, the worker affected thereby shall be entitled to a separation pay equivalent to at least his one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher. In case of retrenchment to prevent losses and in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay or at least one-half (1/2) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year. (Emphasis supplied)

There are three requisites for a valid retrenchment. In *Genuino Ice Company, Inc. v. Lava*,[1] the Court held that:

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[1] G.R. No. 190001, 23 March 2011, 646 SCRA 385.

> x x x [T]here are three (3) basic requisites for a valid retrenchment, namely: (a) proof that the retrenchment is necessary to prevent **losses or impending losses**; (b) service of written notices to the employees and to the [Department of Labor and Employment] at least one (1) month prior to the intended date of retrenchment; and (c) payment of separation pay equivalent to one (1) month pay, or at least one-half (1/2) month pay for every year of service, whichever is higher.[2] (Emphasis supplied)

Under the first requisite, there are two kinds of losses which can justify retrenchment, namely, incurred losses and impending losses. Incurred losses refer to losses that have already occurred. Since they have already occurred, they should be reflected in the financial statements. On the other hand, impending losses refer to losses that have not yet occurred. They are also termed as future or expected losses. Since they have not yet occurred, they are not reflected in the financial statements. Thus, in *Waterfront Cebu City Hotel v. Jimenez*,[3] the Court held that retrenchment must be "reasonably necessary and likely to prevent business losses which, *if already incurred*, are not merely de minimis, but substantial, serious, actual and real, *or if only expected*, are reasonably imminent as perceived objectively and in good faith by the employer."[4] The Court recognizes two kinds of losses which can justify retrenchment — incurred losses which are substantial, serious, actual and real, and expected losses which are reasonably imminent.

Whether the losses are incurred or impending, employers always bear the burden of proving that retrenchment is necessary to abate such losses. In *Flight Attendants and Stewards Association of the Philippines v. Philippine Airlines, Inc.*,[5] the Court held that, "The burden clearly falls upon the employer to prove economic or business losses with sufficient supporting evidence. Its failure to prove these reverses or losses necessarily means that the employee's dismissal was not justified."[6]

In the case of incurred losses, financial statements duly audited by independent external auditors are the best proof. In *Anabe v. Asian Construction (ASIAKONSTRUKT)*,[7] the Court held that, "The losses must be supported by sufficient and convincing evidence, the normal method of discharging [this] is the submission of financial statements duly audited by

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2 Id. at 389.

3 G.R. No. 174214, 13 June 2012, 672 SCRA 185.

4 Id. at 197 citing *Shimizu Phils. Contractors, Inc. v. Callanta*, G.R. No. 165923, 29 September 2010, 631 SCRA 529; *Lambert Pawnbrokers and Jewelry Corporation v. Binamira*, G.R. No. 170464, 12 July 2010, 624 SCRA 705; *Bio Quest Marketing, Inc. v. Rey*, G.R. No. 181503, 18 September 2009, 600 SCRA 721; *Flight Attendants and Stewards Association of the Philippines v. Philippine Airlines, Inc.*, 581 Phil. 228 (2008); *Casimiro v. Stern Real Estate Inc. Rembrandt Hotel and/or Meehan*, 519 Phil. 438 (2006); *Philippine Carpet Employees Association v. Sto. Tomas*, 518 Phil. 299 (2006); *Ariola v. Philex Mining Corp*., 503 Phil. 765 (2005); *Asian Alcohol Corporation v. National Labor Relations Commission*, 364 Phil. 912 (1999).

5 G.R. No. 178083, 22 July 2008, 559 SCRA 252.

6 Id. at 273.

7 G.R. No. 183233, 23 December 2009, 609 SCRA 213.

independent external auditors."[8] In the case of impending losses, financial statements duly audited by independent external auditors are not necessarily the best proof. Obviously, impending, expected or future losses which employers seek to prevent through retrenchment could not yet be reflected in the financial statements. In fact, if the retrenchment adequately serves its purpose, then the impending losses would never be reflected in the financial statements.

In the present case, Sanoh conducted a retrenchment mainly to prevent impending losses, not to abate losses already being incurred. In his *ponencia*, Justice Jose P. Perez (Justice Perez) stated:

> In view of job order cancellations relating to the manufacture of wire condensers by Matsushita, Sanyo and National Panasonic, Sanoh decided to phase out the Wire Condenser Department. On 22 December 2003, the Human Resources Manager of Sanoh informed the 17 employees, 16 of whom belonged to the Wire Condenser Department, of retrenchment effective 22 January 2004. All 17 employees are union members.
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> Sanoh insists that it is the prerogative of management to effect retrenchment as long as it is done in good faith. Sanoh relies on letters from its customers showing cancellation of job orders to prove that it is suffering from serious losses. In addition, Sanoh claims that it had, in fact, closed down the Wire Condenser Department in view of serious business losses.
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> Sanoh asserts that cancelled orders of wire condensers led to the phasing out of the Wire Condenser Department which triggered retrenchment. Sanoh presented the letters of cancellation given by Matsushita and Sanyo as evidence of cancelled orders.

Justice Perez then stated that, even if the retrenchment was conducted for the pupose of preventing *impending* losses, the retrenchment conducted by Sanoh was invalid because it failed to present financial statements. Justice Perez stated that:

> We held in *Lambert Pawnbrokers and Jewelry Corporation v. Binamira*, that the losses must be supported by sufficient and convincing evidence and the normal method of discharging this is by the submission of financial statements duly audited by independent external auditors. It was aptly observed by the appellate court that no financial statements x x x were presented to substantiate Sanoh's claim of loss of ₱7 million per month.

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[8] Id. at 219.

I disagree. Again, impending, expected or future losses which employers seek to prevent through retrenchment could not yet be reflected in the financial statements because they have not yet occurred. In fact, if the retrenchment does indeed prevent the impending losses as it is supposed to do, then such losses would never be reflected in the financial statements. It would be unreasonable and unfair to require employers conducting retrenchment to prevent impending, expected or future losses to submit as proof of such losses financial statements.

The surrounding facts in *Lambert Pawnbrokers and Jewelry Corporation v. Binamira*[9] are not on all fours with the present case. In *Lambert*, the employer alleged as justification for retrenchment *incurred* losses, not impending losses. In that case, the Court held that:

> In their Position Paper, petitioners asserted that they had no choice but to retrench respondent due to economic reverses. The corporation suffered a marked decline in profits as well as substantial and persistent increase in losses. In its Statement of Income and Expenses, its gross income for 1998 dropped ₱1 million to ₱665,000.00.
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> The losses must be supported by sufficient and convincing evidence. The normal method of discharging this is by the submission of financial statements duly audited by independent external auditors. In this case, however, the Statement of Income and Expenses for the yeat 1997-1998 submitted by the petitioners was prepared only on January 12, 1999. Thus, it is highly improbable that the management already knew on September 14, 1998, the date of Helen's retrenchment, that they would be incurring substantial losses.[10]

Sanoh is liable for illegal dismissal not because it failed to present its financial statements but because the surrounding circumstances show that there were no impending losses which were "reasonably imminent as perceived objectively and in good faith by the employer." Sanoh failed to discharge its burden to prove with substantial and convincing evidence that the impending losses it expected to incur were imminent and that the retrenchment it conducted was necessary to prevent such losses.

Justice Perez correctly found that (1) Matsushita had four outstanding orders of refrigerator condensers; (2) Matsushita's Model 602 orders were increased from 500 to 1,600 units; (3) Sanyo had sufficient stocks for three months so it temporarily stopped ordering, then it resumed ordering in February 2004; (4) the additional orders from Concepcion Industries and Uni-Magma more than compensated for the cancelled orders; (5) the Sanoh's Wire Condenser Department was profitable in 2005; (6) Sanoh's Wire Condenser Department was never shut down; and (7) employees in the Wire Condenser Department rendered overtime work.

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9 G.R. No. 170464, 12 July 2010, 624 SCRA 705.

10 Id. at 709-716.

Accordingly, I vote to **DENY** the petition.

ANTONIO T. CARPIO
Associate Justice